No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

October Term 1981

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Farmer's Bank and Trust Company
of Winchester, Tennessee,
Petitioner

v.

Transamerica Insurance Company,
Respondent

_____

On Petition for Certiorari
to the United States Court
of Appeals for the Sixth Circuit

_____

Brief in Opposition to Petition for Certiorari

_____

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QUESTIONS PRESENTED FOR REVIEW

(1) Where the Court of Appeals concludes that the District Court has made erroneous findings of fact because of improper placement of the burden of proof, and where all significant testimony was submitted by deposition, may the Court of Appeals review the evidence and order reversal, or is a remand required?

(2) Having not raised the issue presented in Question One before, by request for a remand on reversal or by petition for rehearing on this issue, is the petitioner foreclosed from raising the issue now?

STATEMENT OF THE CASE

This case was brought by Farmer's Bank and Trust Company under a banker's blanket bond, by which Transamerica agreed to indemnify Farmer's Bank for loss through such bank's having, in good faith and in the course of business, extended credit on the faith of documents or other written instruments which proved to be forged as to the signature of any person signing it in any capacity.

The bank sustained a loss through having extended credit on the faith of a document with the apparent signature of D. M. Hill. It is undisputed that Mr. Hill did not sign the document.

The factual issue for determination by the District Court was authority to sign; in the Court's memorandum opinion at Page 71: "Only if Mr. Hill signed his own name to the instrument in question or caused it

to be signed for him or ratified it would it not have been a forgery."

The Court stated: "It is incumbent upon the defendant to establish satisfactorily its defense that Mr. Hill's signature was affixed to the instrument by the hand of another in a legally binding manner... This it did not do". Based upon the District Court's improper placement of the burden of proof upon the defendant, the Court held that the defendant not having met its burden, the signature was a forgery.

On appeal, the Sixth Circuit found that the District Court had improperly placed the burden of proof on defendant, and that this error led it to make erroneous findings of fact on the issues, reversing the judgment of the District Court. Farmer's Bank petitioned for rehearing, setting forth no new issues, and said petition was denied.

ARGUMENT

I.

The central issue in the District Court being authority or lack of authority to sign for Mr. Hill, the error of law of that Court was in placing the burden of proving authority upon Transamerica rather than requiring the bank to make out its prima facie case by proving lack of authority. As noted by the Sixth Circuit Court of Appeals on Page 1 of their opinion: "The District Court allocated the burden of proof on the question of forgery incorrectly and this error led it to make erroneous findings of fact on the issue."

It is important to note here that the District Court at no time purported to find from the evidence that the plaintiff had proved there was no authority to sign. Rather, the Court found no authority to sign because Transamerica had not proved authority.

The question of law can perhaps be posed in this way: If the issue were untouched by the evidence, which side prevails? The answer to this question is the essence of the error of law made by the District Court. The Court of Appeals discussed this rule of law, and correctly held that the District Court had improperly placed the burden of proof.

After noting that Transamerica contended that the factual findings of the District Court were "clearly erroneous", the Court of Appeals went on to consider whether the plaintiff had made out a prima facie case (at Page 6): "It remains to consider whether the bank proved a forgery. There is no need to remand this case for the purpose of giving the bank the opportunity to meet its burden of proof. All the significant testimony was submitted by deposition and the District Court did not

conclude that the defendant bore the burden of proof during the course of trial, but in its memorandum opinion. There is no indication that the bank would have presented any additional evidence or that it expected the burden of proof to be placed on the defendant."

After examining plaintiff's evidence, the Appellate Court concluded that their evidence did not establish lack of authority as an element of forgery. Going even further, the Court examined Transamerica's proof on rebuttal and, noting that said proof was "strong", stated: "The only logical reason Hill would accept a sublease of nonexistent equipment, which carried with it 60 lease payments of at least $8,000 each, is that he was a full partner in the fraud and either had authorized Herring to sign his name, or ratified the signature."

When considered in its entirety,

it is clear that the Court of Appeals applied the clearly erroneously standard of Rule 52a in reaching its decision, and held that the record permitted only one resolution of the factual issue in question. Having done so, the Court properly reversed the decision of the Trial Court without the necessity for a remand.

A remand is inappropriate where the facts on the record are susceptible to only one reasonable interpretation, Dayton Board of Education vs. Brinkman, 99 Supreme Court 2971 (1979); Bigelo vs. Virginia, 95 Supreme Court 2234 (1974). In those cases, effective judicial administration requires that the Court of Appeals draw the inescapable factual conclusion itself, rather than remand the case to the District Court for further needless proceedings, Levin vs. Mississippi River Corporation, 87 Supreme Court 932 (1967). This rule is especially true

where the District Court's findings of fact are entirely based upon documentary evidence.

Under 28 USC §2106, the Court of Appeals as well as the Supreme Court is granted discretion as to the proper disposition of cases after ruling upon the merits. Under this code section, the Appellate Court may reverse and may remand.

An Appellate Court may enter judgment upon reversing a case, if it finds that the facts are adequately developed in the record and it is able to render judgment in favor of one party as a matter of law. An Appellate Court can finally dispose of a case on appeal if the Trial Judge permitted all relevant evidence to be included in the record, and it appears, from such evidence that the appellant is entitled to relief. If it appears that no purpose may be served by ordering a new trial after reversal, an Appellate Court will direct entry of judgment,

32 AM JUR 2nd, Federal Practice and Procedure §420.

In an action by a tax payer to recover income taxes paid under protest, after the Commissioner of Internal Revenue disallowed deduction for business expense, the Fifth Circuit Court of Appeals held that the tax payer had the burden of proving necessary business expense: "In the absence of such evidence, the District Court could not properly find that the guaranty was an ordinary and necessary business expense..." "In light of Tulia's failure to present evidence, and thus meet its burden of proof, on elements essential to that determination, we think that the District Court's findings were clearly erroneous." "We hold only that the tax payer corporation failed to sustain its burden of proof." "The judgment of the District Court is reversed" (not remanded), Tulia Feedlot, Inc. vs. U.S., 513 F 2nd,

800 (Fifth Circuit 1975), U.S. Cert. denied 423 U.S. 947.

In a case involving excessive verdicts, the Appellate Court, having determined that corrective action must be taken, the question remains whether we should remand the case to the Trial Court or whether this Court should reform the verdict. If a remand would be mere wasted motion, the Appellate Court will recompute the award when the evidence before the Court is as complete as it was at trial, Ferrero vs. U.S., 603 F 2nd, 510 (Fifth Circuit 1979).

Findings induced by a misapprehension of controlling legal principles lose the insulation of the clearly erroneous provision of Rule 52. The Appellate Court, finding that the District Court had ruled on the basis of improper legal principles, reexamined the evidence, and reversed (not remanded), U.S. vs. Richberg, 398 F 2nd, 523

(Fifth Circuit 1968).

When it did not appear that remand would be fruitful, in a case where there is not only no representation that further proceedings would aid in clarifying the intentions of the parties, but there is at least tacit agreement that the background has been explored as thoroughly as possible, the Supreme Court itself considered the facts in evidence and constructed a contract, U.S. vs. Seckinger, 90 Supreme Court 880 (1970).

Appellate procedure was questioned where the Court of Appeals held that evidence at trial was insufficient to establish negligence and reversed the judgment of the District Court with instructions to dismiss.

On consideration by the United States Supreme Court, the question was whether the Court of Appeals, after reversing

a denial of defendant's motion for judgment NOV, may itself order dismissal or direct entry of judgment for defendant.

The Court quoted 28 USC §2106 for the proposition that the Appellate Court has the power to reverse without remand, and held that there is no rule preventing the Court of Appeals from ordering dismissal and judgment for defendant when plaintiff's verdict has been set aside on appeal, Neely vs. Martin K. Eby Construction Company, 87 Supreme Court 1072 (1967).

In support of petitioner's contention that the Sixth Circuit Court of Appeals departed from the accepted course of judicial proceedings by failing to remand the case, petitioner relies upon Pullman Standard vs. Swint, 102 Supreme Court 1781, 72 L.Ed 2nd 66 (1982). In that case, the Court of Appeals concluded that the District Court had erred in failing to consider

certain relevant evidence and reversed the District Court without remand by making its own determination based upon such evidence.

In reversing the action of the Court of Appeals, the Supreme Court noted: "The Court of Appeals, after holding that the District Court had failed to consider relevant evidence and indicating that the District Court might have come to a different conclusion had it considered that evidence, failed to remand for further proceedings as to the intent of USW itself. Instead, the Court of Appeals made its own determination as to the motives of IAM..."

The present case involves an altogether different circumstance. Unlike in Pullman, there has never been any allegation that there was evidence which was not considered by the Trial Court. In fact, as the Court of Appeals observed, there is no indication that the bank would have presented

any additional evidence or that it expected the burden of proof to be placed on the defendant, since the error made by the District Court was not made at the trial, but rather was made in the Court's memorandum opinion.

The present case does not involve evidence which the District Court improperly failed to consider, which the Court of Appeals then considered, and then, based upon this new evidence reached a different factual conclusion. Rather, the error made was in applying an improper legal standard to the proof as presented by holding, post trial, that the burden of proof as to the central issue lay with the defendant (the Court of Appeals considering identically the same evidence as did the District Court).

Since there is no allegation in the petition for certiorari of additional evidence which would be presented at a new

trial which was not admitted or not considered in the first trial, and since the Court of Appeals has found the findings in the first trial to be erroneous, there is no reason for a remand for a new trial; as a matter of fact, the record in this case is totally devoid of any evidence to suggest lack of authority except the stipulation that Hill did not pen his own signature. Such a remand would be redundant, and contrary to the interests of judicial economy.

II.

Having not raised the issue before, by request for a remand on reversal or by petition for rehearing on this issue, is the petitioner foreclosed from raising the issue now?

The actions of the Court of Appeals in simply reversing the judgment of the District Court without remanding the case for new trial, is not open to attack in the

Supreme Court where there was no objection made to that action, no request for remand of the case, and where there was nothing to retry, as the case involved only a proposition of law, Forged Steel Wheel Company vs. Lewellyn, 40 Supreme Court 285 (1920).

The Court considered the question in Neely vs. Martin K. Eby Construction Company, Supra, 87 Supreme Court 1072 (1967). In the Court of Appeals, the issue was the sufficiency of the evidence and the Court set aside the verdict. Appellee suggested no grounds for a new trial in the event judgment was reversed, nor did appellant petition for rehearing in the Court of Appeals, even though that Court had directed a dismissal of the case. Neither was it suggested that the record was insufficient to present any new trial issues or that any other reason requires a remand to the District Court. "Under these circumstances

we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here, Supreme Court Rule 40(1)(D)(2)." "Petitioner's case in this Court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent. We have rejected that argument and therefore affirm."

Respectfully submitted,

By: _____

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AFFIDAVIT OF SERVICE

I, William B. Luther, attorney for the respondent herein, depose and say that on the 16th day of September, 1982, I deposited three (3) copies of the Brief in Opposition to the Petition for Certiorari to counsel of record for the petitioner at his post office address.

William B. Luther

Subscribed and sworn to before me, this 16th day of September, 1982.

Notary Public

My Commission Expires: 10-18-83